Filed 8/14/19 DiCostanzo v. DiCostanzo CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEBBERA S. DICOSTANZO,

Plaintiff and Appellant,

v.

JAY DICOSTANZO et al.,

Defendants and Respondents.

E070770

(Super.Ct.No. RIC1713570)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed.

Glenn A. Williams for Plaintiff and Appellant.

Jay DiCostanzo, Defendant and Respondent in pro. per.

Nialis Law Group and Mark A. Nialis for Defendant and Respondent Donald DiCostanzo, as Trustee of the DiCostanzo Family Trust.

In 2002, Debbera DiCostanzo (Debbera) filed for a divorce from her husband Jay DiCostanzo (Jay). In 2003, in the divorce proceeding, she filed a complaint against Jay and against Jay's father John DiCostanzo (John), individually and as trustee of the

DiCostanzo Family Trust (Trust). The complaint related to the title to the house in which Jay and Debbera lived during the marriage.[1]

In 2004, the trial court severed the civil action from the divorce proceeding. However, the civil action was not assigned a new case number at that time.

Also in 2004, Jay filed a bankruptcy. The bankruptcy trustee filed an adversary action against Jay, John, and the Trust, which also presented issues related to title to the house. By 2010, those issues had been resolved adversely to Debbera.

In 2016, Debbera revived the litigation of the civil action by filing an amended complaint. In 2017, the amended complaint was (belatedly) assigned a new case number. In 2018, on the Trust's motion, the trial court dismissed the case for failure to bring it to trial within five years. (§ 583.310.)[2] It opined: "I think you have to be Houdini to escape the reach of [the five-year rule] in this case."

Debbera appeals. She contends:

1. The five-year rule did not apply, because there had already been a partial trial, on three occasions.

2. The five years had not run because there were three separate periods during which it was tolled.

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[1] We will refer to the complaint and all of the resulting proceedings as the "civil action."

[2] This and all further statutory citations are to the Code of Civil Procedure, unless otherwise specified.

We will hold that Debbera has not shown that there was any partial trial of the civil action (as opposed to the divorce proceeding). We will also hold that, even if we assume the longest even arguable period of tolling, the five years had run. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

The procedural facts regarding the divorce and the bankruptcy are taken from the evidence that was before the trial court (mostly by way of requests for judicial notice) when it ruled on the motion to dismiss.[3] The procedural facts regarding this case are taken from the clerk's transcript.

A. *The Divorce Proceeding*.

On October 15, 2002, Debbera filed a divorce petition against Jay.

On January 13, 2003, in the divorce proceeding, Debbera filed a complaint against Jay, John, and the Trust.[4] That complaint is not in the record. The parties have stipulated

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[3] Conversely, we do *not* consider any evidence that was *not* before the trial court when it ruled. That includes documents that were offered in connection with an earlier demurrer.

[4] In a divorce proceeding, a spouse can seek to join a third party by filing a motion for joinder. (Cal. Rules of Court, rule 5.24(d)(1).) The motion must be accompanied by a "by an appropriate pleading setting forth the claim as if it were asserted in a separate action or proceeding" (*ibid.*), known as a "complaint for joinder." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2019) ¶ 3:463, p. 3-171.)

"The law applicable to civil actions generally governs all pleadings, motions, and other matters pertaining to that portion of the proceeding as to which a [third party] has

that January 13, 2003 "is deemed to be [the] commencement date of the civil litigation for purposes calculating . . . any deadlines under Code of Civil Procedure section 583.310 or any related statutes."

On June 4, 2004, the trial court severed the civil action from the divorce proceeding and directed the clerk to transfer the civil action to the Historic Courthouse. Nevertheless, it was not assigned a new case number; the parties continued to file documents in the civil action under the family law caption and the family law case number.

On February 21, 2006, the trial court bifurcated and adjudicated the issue of marital status.

On March 5, 2007, it entered a "Judgment on Reserved Issues" in which it adjudicated various issues relating to the divorce. (Capitalization altered.)

B. *Bankruptcy Proceeding*.

Meanwhile, on December 14, 2004, Jay filed a bankruptcy petition.

Sometime on or before June 1, 2006, the bankruptcy trustee filed an adversary proceeding against Jay, John, and the Trust. The adversary complaint also is not in the record.

On October 17, 2007, the bankruptcy court approved a settlement between the bankruptcy trustee, John, and the Trust. It provided that all of Jay and Debbera's

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been joined . . . in the same manner as if a separate action or proceeding not subject to [the family law] rules had been filed . . . ." (Cal. Rules of Court, rule 5.24(a)(2); see also *id*., Rule 5.24(b).)

community property, including the house, was property of the bankruptcy estate. It then awarded the house to John, in exchange for a payment of $95,000 and other consideration.

On December 19, 2007, the bankruptcy court stayed its approval of the settlement, on condition that Debbera post a $100,000 bond within 10 days. She failed to do so.

On August 28, 2008, the district court affirmed the bankruptcy court's approval of the settlement.[5] On March 17, 2009, the bankruptcy court dismissed the trustee's adversary proceeding. On October 13, 2010, the Ninth Circuit Court of Appeals affirmed the district court. On November 4, 2010, it issued its mandate.

C. *The Present Civil Action.*

On April 29, 2016, Debbera filed a second amended complaint in the civil action.

Thereafter, John died. Debbera dismissed John as an individual defendant. She amended to name Donald DiCostanzo (Donald) as successor trustee of the Trust.

On June 2, 2017, the Trust filed a motion to sever the second amended complaint.[6] On July 18, 2017, the parties stipulated to the severance. As a result, the second amended complaint, and all subsequent related documents, were filed under a new civil case number.

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[5] Meanwhile, on August 19, 2008 and on September 10, 2008, the trial court held hearings concerning the effect of the bankruptcy proceeding on the divorce proceeding. We discuss these in more detail in parts II.B.2 and II.B.3, *post*.

[6] Of course, it had already been severed, in 2004.

Debbera then filed a third amended complaint. It alleged that Jay and Debbera had been the true owners of the house; Jay, John, and the Trust, however, had conspired, first to place the house in the name of the Trust and later to deprive Debbera of her interest in it via the bankruptcy. Debbera seeks damages; she does not seek a property interest in the house.

On February 20, 2018, the Trust filed a motion to dismiss under the five-year rule. (§ 583.310.) Jay joined in the motion.

After hearing argument, the trial court ruled that it would grant the motion. It found that there had not been any partial trial. It also found that, "[l]ooking at the case in the light most favorable to [Debbera], you've gone way over five years . . . ." On April 25, 2018, it entered an order of dismissal.

II

PARTIAL TRIAL

Debbera contends that there had been a partial trial within the meaning of section 583.161.

A. *General Legal Background*.

Section 583.310 — commonly known as the five-year rule — provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." If it is not, the trial court may dismiss the action on a noticed motion. (§ 583.310, subd. (a).)

Section 583.161, as relevant here, provides:

"A petition filed pursuant to Section . . . 2330 of the Family Code[7] shall not be dismissed pursuant to this chapter if any of the following conditions exist: [¶] . . . [¶]

"(d) An issue in the case has been bifurcated and one of the following has occurred:

"(1) A separate trial has been conducted pursuant to Section 2337 of the Family Code.[8]

"(2) A separate trial has been conducted pursuant to the California Rules of Court."

B. *Evidence of a Partial Trial.*

Section 583.161 is irrelevant. Here, the trial court did not dismiss "[a] petition filed pursuant to Section . . . 2330." It dismissed the civil action. Way back in 2004, the civil action had been severed from the divorce proceeding. From then on, it took on a life of its own. A dismissal of the civil action would not be a dismissal of the divorce proceeding, nor vice versa.[9]

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[7] Family Code section 2330 provides for the filing of a petition for dissolution of marriage.

[8] Family Code section 2337, as relevant here, provides: "In a proceeding for dissolution of marriage, the court . . . may sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues." (*Id.*, subd. (a).)

[9] As mentioned, the parties stipulated that the commencement date for purposes of the five-year rule was January 13, 2003, when the civil action was filed, rather than October 15, 2002, when the divorce proceeding was filed. Thus, they implicitly recognized that that the two were separate proceedings.

Even if the civil action had not been severed, it would still be governed by its own timelines. This follows from rule 5.24(a)(2) of the California Rules of Court, which, as already mentioned (see fn. 1, *ante*), provides: "The law applicable to civil actions generally governs all pleadings, motions, and other matters pertaining to that portion of the proceeding as to which a [third party] has been joined . . . *in the same manner as if a separate action or proceeding* not subject to [the family law] rules *had been filed* . . . ." (Italics added.)

Even aside from section 583.161, however, an ordinary civil action cannot be dismissed under the five-year rule once there has been a partial trial. (*Mastelotto v. Harbor Box & Lumber Co.* (1959) 170 Cal.App.2d 429, 433.) In this case, that would require a partial trial *of the civil action*. A partial trial of the divorce proceeding would not count.

For purposes of the five-year rule, "[a] trial is generally considered an adversary proceeding for the determination of a contested issue arising out of pleadings in which a fact or conclusion of law is maintained by one party and controverted by the other. [Citation.]" (*Langan v. McCorkle* (1969) 276 Cal.App.2d 805, 808, disapproved on other grounds in *Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 555, fn. 13.)

"A matter is considered to have been brought to trial when the jury is sworn or when the first witness is sworn in a non-jury trial. [Citation.]" (*Varwig v. Leider* (1985) 171 Cal.App.3d 312, 315.)

A case is also brought to trial when there is a "a pretrial disposition on the merits, i.e., 'the determination of an issue of fact or law *which brings the action to the stage where final disposition can be made*.' [Citation.]" (6 Witkin, Cal. Proc. (5th ed. 2008) Proceedings Without Trial, § 378, p. 823, italics added; e.g., *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860-861 [action is brought to trial when demurrer is sustained without leave to amend]; *Southern Pac. Co. v. Seaboard Mills* (1962) 207 Cal.App.2d 97, 104 [action is brought to trial when motion for summary judgment is granted].) However, a hearing at which a demurrer or a motion for summary judgment is granted in part and denied in part is not a partial trial. (*In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 255; *King v. State of California* (1970) 11 Cal.App.3d 307, 310-312.)

Under the circumstances of this case, we review the question of whether there has been a partial trial under the de novo standard, because it does not hinge on any factual issues arising out of conflicting or disputed evidence. (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1092.)

With these principles in mind, we turn to the three occasions on which Debbera claims there was a partial trial.

1. *January 26, 2007*.

a. *Additional factual and procedural background*.

On January 26, 2007, after the civil action had been severed, the "dissolution of marriage case was called for a hearing . . . ."

An attorney representing both John and the Trust appeared. However, the court excused him "early in the day," because the only issues involving his clients either were "being litigated" in the bankruptcy or were "inextricably intertwined" with the issues being litigated in the bankruptcy.

The trial court then held an "informal" trial.[10] It adjudicated a number of issues, all arising out of the divorce, including spousal support and the division of tangible personal property. Afterwards, it entered a "Judgment on Reserved Issues."

b. *Discussion*.

The January 26, 2007 hearing was held exclusively in the divorce proceeding. The court did not consider any of the issues arising out of the civil action; it expressly declined to do so, because they were at issue in the bankruptcy. Accordingly, this was not a partial trial of the civil action.

2. *August 19, 2008*.

a. *Additional factual and procedural background*.

On August 19, 2008, under the divorce case number, the trial court held a "Hearing re: Jury Trial." (Capitalization altered.) John's counsel was present.

The court and counsel "confer[red] informally" and discussed unspecified "[i]ssues." The court ordered: "Contested [f]amily law claim dismissed." It also ordered: "Any claim by Debra [*sic*] — ownership inter[est] — residence community

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[10] Debbera asserts that "[t]he Court received evidence, swore the parties as witnesses and took testimony from them . . . ." The record does not support this assertion.

property is . . . discharged." (Capitalization altered.) However, it also ordered: "[D]ischarge does not [a]ffect rights to non-community property claims." It set a hearing regarding such "non[-]community property claim[s]" for September 10, 2008.

b. *Discussion*.

A "Hearing re: Jury Trial" is not a jury trial. It does not appear that there was a jury, and it does not appear that there was a trial. No witnesses were sworn and no evidence was taken. As far as we can tell, there was not even a dispositive motion (such as a demurrer or a motion for summary judgment) pending.

In Debbera's view, however, "This was a final order and adjudication of Debbera's interest in the family residence." If she is talking about the portion that said, "[c]ontested [f]amily law claim dismissed," the record does not show just what claim or whose claim was dismissed, and thus it does not support her view.

If she is talking about the portion saying that her claim of an ownership interest in the community property house was "discharged," that appears to be simply acknowledging the effect of Jay's discharge in bankruptcy. There is no indication that Debbera contested this finding; for all we know, she stipulated to it.

We also note that in the civil action, as far as the record shows, Debbera is not claiming an ownership interest in the house. Rather she is alleging that she has been deprived of an ownership interest that she once had in the house, and therefore she is entitled to damages. Thus, the ruling that her claim of an ownership interest in the house was "discharged" appears to relate to her community property claims in the divorce

proceeding, and not to the (previously severed) civil action. That is supported by the fact that the trial court also ordered that her non-community property claims were not affected.

Debbera cannot have it both ways. If the August 19, 2008 order adjudicated all of her claims in the civil action, then the civil action is barred as a matter of res judicata. But if it did not, then the civil action was not brought to trial, because the trial court did not make any ruling that brought the case to the stage where a final disposition could be made.

3. *September 10, 2008.*

a. *Additional factual and procedural background.*

On September 10, 2008, the family law court held a "Hearing re: Non[-] Community Property Claim." (Capitalization altered.) Counsel was not present for John or for the Trust. Debbera and Jay were sworn and testified. Unspecified "[i]ssues" were discussed with the court. Even though the hearing was supposedly about non-community property claims, the trial court's only ruling was that "the parties['] community property has been adjudicated in [bankruptcy] court."

b. *Discussion.*

On September 10, 2008 — unlike on August 19, 2008 — witnesses were sworn and testified. Once again, however, it does not appear that the hearing concerned any of the issues raised by the civil action. Had it done so, John and the Trust would have had

to be represented. It appears that it related solely to the couple's claims against each other in the divorce.

C. *Prior Ruling by the Trial Court.*

Debbera contends that in 2015, the trial court ruled that there *had* been a partial trial, which precluded it from ruling in 2018 that there *had not* been a partial trial.

She forfeited this contention by failing to raise it below. "It is axiomatic that arguments not raised in the trial court are forfeited on appeal. [Citations.]" (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1038.)

In addition — as a corollary of her failure to raise it below — she did not provide the trial court with the necessary evidence. The moving or opposition papers did not include a copy of the alleged 2015 ruling.

Debbera did try to supply this evidence belatedly, by asking us to take judicial notice of the ruling on appeal. We denied that request, however, because the ruling was not before the trial court when it granted the motion to dismiss; hence, it was irrelevant. "'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally "when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered."' [Citations.]" (*People v. Jacinto* (2010) 49 Cal.4th 263, 272, fn. 5.)

Incidentally, even if we had granted the request for judicial notice, it would make no difference to the outcome. Because the 2015 ruling was not in evidence below, we can hardly say that the trial court erred by failing to consider it.

Separately and alternatively, Debbera has also forfeited this contention by failing to support it with reasoned argument and relevant authority. An appellate brief must "support each point by argument and, if possible, by citation of authority . . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why. [Citation.]" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) "'We are not bound to develop appellants' argument[s] for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat [a] contention as waived.' [Citation.]" (*Calvert v. Al Binali* (2018) 29 Cal.App.5th 954, 964.)

Again belatedly, Debbera did attempt to supply the necessary arguments and authorities in her reply brief. But this was ineffective. """'Obvious considerations of fairness in argument demand that the appellant present all of [her] points in the opening brief. To withhold a point until the closing brief would deprive the respondent of [her] opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.'"' [Citation.]" (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 453.)

III

TOLLING

Debbera contends that there were three periods during which the running of the five-year clock was tolled.

"In computing the time within which an action must be brought to trial . . . , there shall be excluded the time during which any of the following conditions existed:

"(a) The jurisdiction of the court to try the action was suspended.

"(b) Prosecution or trial of the action was stayed or enjoined.

"(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (§ 583.340.)

Debbera had the burden of proving tolling. (*Muller v. Muller* (1960) 179 Cal.App.2d 815, 819.)

We review the question of whether the action was stayed de novo. (*Gaines v. Fidelity National Title Ins. Co.*, *supra*, 62 Cal.4th at p. 1092.) However, we review the trial court's findings regarding impossibility, impracticability, or futility under the abuse of discretion standard. (*Martinez v. Landry's Restaurants, Inc.* (2018) 26 Cal.App.5th 783, 794.)

A. *Family Law Stay on February 28, 2005*.

First, Debbera asserts that, on February 28, 2005, in light of Jay's bankruptcy, the family law court stayed the prosecution of the civil action "until and unless the bankruptcy court rules otherwise or defers to this Court." She also asserts that the

bankruptcy court never "rule[d] otherwise" and never "defer[red]" to the superior court, so that this stay remains in effect to this day.[11]

She does not cite this assertion to the record. Rather, she cites her request for judicial notice on appeal. As already discussed, however (see part II.C, *ante*), we denied that request. Although under no duty to do so, we have combed through the record in connection with the motion to dismiss. Debbera did mention the stay in her memorandum of points and authorities, but she did not submit any evidence of it.

In any event, we reject this contention on the merits. As we have said, Debbera had the burden of proving tolling. Therefore, she had the burden of proving that the bankruptcy court never relinquished jurisdiction.

Because Debbera's original complaint is not in the record, it is hard to say exactly how the bankruptcy automatic stay applied to it. However, the automatic stay would apply to the civil action as against Jay, but not necessarily as against John or the Trust. (11 U.S.C. § 362(a)(1); *Seiko Epson Corp.* v. *Nu-Kote Intern., Inc.* (Fed. Cir. 1999) 190 F.3d 1360, 1364.) Similarly, it would apply to claims to the house, but not necessarily to claims for damages for the loss of the house. (11 U.S.C. § 362(a)(3).) Thus, it appears

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[11] We know, however, that Debbera has been prosecuting her complaint since at least 2016. She does not explain why, if such a stay is indeed in effect, she has not violated it.

that the bankruptcy automatic stay terminated on December 29, 2007, when Debbera failed to post a bond and therefore the house ceased to be property of the estate.[12]

At that point, if the asserted family law court stay was in effect, it, too, terminated, because the end of the automatic stay allowed the superior court to exercise jurisdiction.

At most, then, litigation of the civil action was stayed from December 14, 2004, when the house became property of the estate, until December 29, 2007, when it ceased to be property of the estate.

B. *Stays Due to Debbera's Appeals*.

Second, Debbera asserts that litigation of the civil action was stayed during two previous appeals to this court.

Subject to various exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, . . . but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (§ 916, subd. (a).)

Debbera states that she filed the first appeal (case No. E035385) on July 11, 2003, and the remittitur was issued on May 20, 2004. However, she forfeited any reliance on

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[12] The Trust takes the position that both the automatic stay and the family law stay ended on August 28, 2008, when the district court affirmed the bankruptcy court.

While arguments could perhaps be made in favor of this as well as other dates, Debbera has forfeited them all by taking the absolutist position that the family law stay did not end and still has not ended, to this day. Clearly, this is incorrect.

that appeal by failing to raise it in the trial court. She also failed to ask the trial court to take judicial notice of it, so the record does not reflect its existence.

In addition, even if we were to accept Debbera's representations regarding the first appeal, she does not tell us *what* she was appealing *from*. For example, it may have been some order connected to the divorce but wholly unconnected with the civil action. Thus, we cannot say that the resulting automatic stay extended to litigation of the civil action.

The automatic stay also would not apply if Debbera appealed from a nonappealable order (*Central Sav. Bank of Oakland v. Lake* (1927) 201 Cal. 438, 442; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666) or in an untimely manner. (*Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 146-147.) The record fails to show that she did not.

Debbera then states that she filed the second appeal (case No. E047875) on March 5, 2009, and that the remittitur was issued on April 19, 2010. Once again, she failed to ask the trial court to take judicial notice of these dates. The Trust helped her out by submitting some evidence of the date of the remittitur, but there is still no evidence of the date of the notice of appeal.

In any event, as our opinion in that appeal shows, we dismissed it as taken from a nonappealable order. Accordingly, the appeal did not give rise to an automatic stay. (*Central Sav. Bank of Oakland v. Lake*, *supra*, 201 Cal. at p. 442.)

C. *Stays Due to John's Death*.

Third, Debbera contends that litigation of the civil action was stayed from May 4, 2016, when John died, until December 30, 2016, when she amended her complaint to name Donald as successor trustee.

We may assume, without deciding, that it was impossible to bring the case to trial during the period after John died and before a successor was named. The record, however, does not establish the date on which John died. Debbera claims it was May 4, 2016, but she does not cite this claim to the record. (See Cal. Rules of Court, rule 8.204(a)(1)(C).)

The record also does not establish when it became feasible for Debbera to proceed again. She claims that she had to go use formal discovery to find out the identity of the successor trustee, but once again, she does not cite the record.

D. *Net Effect of All Asserted Stays.*

Finally, even if we accept all but one of Debbera's assertions, she still cannot prevail. We must reject her assertion that the family law stay never ended (which is clearly ridiculous, and which would mean that she herself violated that stay). Instead, we assume the bankruptcy ended, and the family law stay therefore also ended, on the latest possible date — namely November 4, 2010, when the Ninth Circuit issued its mandate. In that light, the civil action was stayed as follows:

Stay/Impracticability	Began	Ended
Stay due to first appeal	July 11, 2003	May 20, 2004
Stay due to bankruptcy	December 14, 2004	November 4, 2010
Stay due to second appeal (subsumed in stay due to bankruptcy)	March 5, 2009	April 19, 2010
Impracticability due to John's death	May 4, 2016	December 30, 2016

This left the civil action *unstayed* from:

1. January 13, 2003 through July 11, 2003;

2. May 20, 2004 through December 14, 2004; and

3. November 4, 2010 through May 4, 2016

— a period of about six and a half years. It follows that the trial court correctly granted the motion to dismiss.

IV

DISPOSITION

The judgment is affirmed. The Trust is awarded costs on appeal against Debbera.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

SLOUGH
J.

FIELDS
J.